No. 96-1241

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

JAMES L. SAFFLE, Director; RON WARD, Warden of Oklahoma State Penitentiary; MICHAEL ROARK, Chairman of the Board of Corrections; HUGH REED, JOE R. MANNING, JR., DANIEL BINTZ, RANDY WHITE and BEVERLY YOUNG, all members of the Oklahoma Board of Corrections; and OKLAHOMA BOARD OF CORRECTIONS,

Petitioners,

v.

BOBBY BATTLE, Class Representative for all persons incarcerated by the Oklahoma Department of Corrections,

Respondents,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit After Remand From The Supreme Court

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 1997

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QUESTION PRESENTED

1. Whether the court of appeals erred in remanding this case to the district court for consideration of petitioners' motion to terminate previously-entered permanent injunctions in light of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134 (Tit. VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, 110 Stat. 1321-66) (to be codified at 18 U.S.C. § 3626).

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unpublished, but the decision is noted at 100 F.3d 967 (Table).

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1996. The petition for a writ of certiorari was docketed February 6, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Respondent Bobby Battle initiated this class action in 1972 for himself and on behalf of all other inmates incarcerated within the Oklahoma State Penitentiary system. The complaint alleged that petitioners' operation of the State's penitentiary system deprived the class of rights secured by the First, Eighth, and Fourteenth Amendments to the Constitution, in violation of 42 U.S.C. § 1983. *Battle v. Anderson*, 376 F. Supp. 402, 407 (E D. Okla. 1974).[1]

[1] This case originally covered the Oklahoma Penitentiary and a system of prisons under its control. Later, after Oklahoma consolidated its prison system into a single state wide system, the district court's orders were extended to cover the entire state system (OSP).

The United States intervened in the action pursuant to 42 U.S.C. § 2000h-2. *Battle v. Anderson*, 614 F.2d 251, 253 (10th Cir. 1980); *Battle v. Anderson*, 564 F.2d 388, 392 (10th Cir. 1977). The United States' initial complaint in intervention alleged that petitioners were operating the OSP on a racially segregated basis with respect to housing, work assignments, and other privileges and activities. *Battle v. Anderson*, 376 F. Supp. at 407. The United States later amended its complaint to allege, in addition, arbitrary disciplinary action against inmates of all races, in violation of the Due Process Clause of the Fourteenth Amendment; cruel and unusual conditions of confinement, in violation of the Eighth Amendment; unreasonable restrictions on inmates' religious practices and correspondence, in violation of the First Amendment; and infringement of inmates' right of access to the courts. *Id.* at 407-08.

After a bench trial in March 1974 the district court held that nine areas of OSP operation violated the Constitution. Specifically, the court held that petitioners had violated, and continued to violate, the Eighth Amendment's prohibition against cruel and unusual punishment by imposing on inmates unreasonable and excessive use of chemical agents as a punitive measure, inadequate medical care, and prolonged periods of solitary confinement in unsanitary and dangerous conditions.[2] The court further found that petitioners were engaging in racial

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[2] Those conditions included placing inmates in subterranean isolation, known as the "hole," for prolonged periods, and depriving inmates of food, clothing, bedding, light, and basic personal hygiene items. *Battle v. Anderson*, 376 F. Supp. at 423-24.

segregation and discrimination with regard to inmate housing, discipline, and work assignments; that petitioners' disciplinary procedures violated due process; that OSP restrictions on inmates' receipt of correspondence and periodicals violated the First Amendment; that petitioners were violating the inmates' freedom of religion; and that petitioners were not providing inmates constitutionally adequate access to the courts. *Battle v. Anderson*, 376 F. Supp. at 408-28. The court enjoined the unlawful activities and ordered petitioners to propose a remedial plan. *Id.* at 428-37. Petitioners did not appeal.

The district court conducted further hearings between 1974 and 1977 concerning the conditions of confinement prevailing throughout OSP and petitioners' remedial efforts, and became "equally convinced that the inmate conditions now existing present an immediate and intolerable threat to the safety and security of inmates, prison personnel and the people of the State of Oklahoma with attendant monetary losses and costs of staggering proportions." *Battle v. Anderson*, 447 F. Supp. 516, 517 (E.D. Okla. 1977).[3] The court also identified numerous

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[3] The uncontested evidence before the court detailed threatening conditions in several OSP institutions, including, among other things: non-existent fire-fighting capabilities, rodent and vermin infestation, inadequate plumbing and water systems, the absence of ventilation necessary to prevent the spread of disease, and structural problems, including the separation of steel bulkheads. *Battle v. Anderson*, 447 F. Supp. at 522-23. The court observed that petitioners' "neglect, apathy and deliberate disregard for human decency and rights contributed directly to the tragic loss of lives and $20 million in state property damages" that resulted from a July 1973 riot at the State Penitentiary at McAlester, Oklahoma. *Id.* at 517. The court found that "the conditions which precipitated and caused

instances of non-compliance by petitioners with the court's prior order, and the "intransigence" of OSP officials or their counsel. *Id.* at 517-19, 524. The district court found, among other things, that petitioners' continued use of outdated cellhouses, and grossly inadequate sewage systems, food facilities, gas lines, fire safety systems, and plumbing created serious health, safety and security risks. *Id.* at 521-24.

Although the district court had been "loath to consider the necessity of closing the Oklahoma State Penitentiary at McAlester as a direct or indirect result of its orders," 376 F. Supp. at 428, petitioners' own evidence conceded the seriously deficient condition of many of its institutions, 447 F. Supp. at 520-22, and recommended that the entire Granite facility "be phased out over a ten to fifteen year period." *Id.* at 523.

Petitioners did not challenge or appeal the district court's findings and conclusions regarding unconstitutional conditions, but appealed the district court's remedial order claiming that the order impermissibly interfered with the State's administration of its prison system. *Battle v. Anderson*, 564 F.2d 388, 397-98 (10th Cir. 1977).[4] The court of appeals began its review by noting

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the disastrous riot of 1973 at McAlester now prevail throughout the system." *Ibid.*

[4] The court of appeals noted that the sole issue in petitioners' 1977 appeal concerned the remedy, not whether OSP conditions were constitutional: "Unconstitutional conditions now, and for a long time, have prevailed in the Oklahoma State penal system . . . [t]here is no evidence to the contrary and counsel for the defendants has never seriously argued to the contrary. Since the unconstitutionality of the

that it shared the district court's reluctance to intervene in state prison administration:

> We, too, abhor any situation or circumstance requiring the intervention of the federal courts in matters involving the administration, control and maintenance by the sovereign states of their penal systems.

564 F.2d at 392. In its decision, however, the court of appeals explicitly noted that, contrary to the claims of petitioners, the district court had never dictated the means by which petitioners were to achieve constitutionality. *Id.* at 398. Rather, "[t]he details and administration of a program are left solely to the discretion of the defendants. The Court is interested in ends and not means so long as they are lawful." *Ibid.* The court of appeals also observed:

> The evidence of existing environmental health and safety problems in the system is overwhelming. There is no doubt that the overcrowding increases the incident of both infectious-communicable diseases. . . . Defendants offer no assurances that in the do-nothing interim requested by them, that inmate fatalities or permanent impairment of the physical and mental health of inmates will not result from these causes. It is a harsh thing to say that the lives and health of inmates must be sacrificed to the administrative convenience of the defendants * * * still the State has not prevented the degenerated overcrowding conditions which

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conditions is undisputed the only real question is how much longer plaintiffs' class must endure their constitutional deprivations." *Battle v. Anderson*, 564 F.2d at 397.

> have come to pass at the Oklahoma State Penitentiary at McAlester and the Oklahoma State Reformatory at Granite.

Id. at 398, 403.

In 1978 the district court conducted hearings and appraisals of possible remedies, culminating in a remedial order, reported at 457 F. Supp. 719 (E.D. Okla. 1978). The court found that petitioners were not in substantial compliance with orders concerning disciplinary process, racial segregation, use of chemical agents, court access, health care, and conditions of confinement, and set firm deadlines to comply with its orders. *Id.* at 721-25, 738-40. Again, petitioners did not contest evidence that outdated cellhouses were unfit for human habitation. *Id.* at 723-26. Much of the evidence was presented by petitioners' own witnesses. *Ibid.*

Petitioners did not challenge or appeal the constitutional foundations of the district court's 1978 order but appealed the remedial requirements of the order. *Battle v. Anderson*, 594 F.2d 786, 792 (10th Cir. 1979). The court of appeals began by reiterating its reluctance to sanction federal intervention in state prison administration and found that the district court "may not have provided the State of Oklahoma adequate opportunity to develop those objectives it was then pursuing to accomplish the remedies ordered by the Court." *Id.* at 789. The court of appeals, however, also observed that, "[i]n our view, the District Court has not 'closed the door' to alternative remedies. The State of Oklahoma has not sought a modification or amendment to the order of September 11, 1978." *Id.* at 792. Accordingly, the court of appeals "decline[d] to affirm, reverse or modify the District Court's order," *id.* at 793, remanded the case to allow petitioners to propose remedies, and instructed: "[t]he

State of Oklahoma is requested to address itself to all possible remedial steps in order to comply with the existing deficiencies." *Ibid.*

In 1979 petitioners, in accordance with the court of appeals' instructions, proposed a plan to remedy OSP's continuing constitutional deficiencies. In that proposal, petitioners agreed to, among other things, limit the number of inmates per cell; close the East and West Cellhouses at McAlester by June 1981; renovate the reformatory at Granite or close it by January 1982;[5] bring water, sewage, and electrical systems into compliance with state laws; bring the prisons into compliance with the standards of the American Correctional Association, the American Public Health Association, and the Life Safety Code; and to comply with the district court's prior orders regarding racial segregation, medical care, and access to the courts. *Battle v. Anderson*, No. 72-95-C (E.D. Okla. May 4, 1979) (order approving defendants' plan). The district court entered petitioners' proposed plan as an order on May 4, 1979. *Ibid.*

2. Petitioners later sought and were granted extensions of the deadlines for closing the condemned cellhouses. *Id.* (Aug. 11, 1981) (findings and order granting until July 31, 1983); *Id.* (July 19, 1992) (order granting until Nov. 18, 1983). In addition, in April 1982 the district

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[5] The State's plan included vacating the cellhouses which prior orders and the State's own evidence found to be unfit for human habitation. Those cellhouses included the East and West cellhouses at the Oklahoma State Penitentiary at McAlester, Oklahoma, and the East and West cellhouses at the Oklahoma State Reformatory at Granite, Oklahoma (hereafter referred to as the "condemned cellhouses").

court authorized double celling on an indefinite basis provided that constitutional requirements were met. *Battle v. Anderson*, 708 F.2d 1523, 1527 (10th Cir. 1983).

3. The district court conducted an evidentiary hearing in October 1982 on the question whether the constitutionality of double celling in OSP was no longer in doubt under *Rhodes v. Chapman*, 452 U.S. 337 (1981). The court stated that it "considered this case as one of equity whereby the court was required to do what is 'right' between the parties in the area of operation of the Oklahoma penal system within constitutional limits." *Battle*, 708 F.2d at 1532. The district court noted that the Oklahoma penal system was overcrowded, but concluded on the basis of the evidence presented that double celling was not then creating unconstitutional conditions of confinement. *Ibid.* The court, however, retained jurisdiction over that issue because it also found that past unconstitutional conditions threatened to recur, finding:

> while the Court would not conclude from the evidence presented that the system has become unconstitutional in its operation, the system is clearly in the state of rapid decline. The system has slipped into the twilight of constitutional compliance and could well slip into its previous unconstitutional condition.

Battle, 708 F.2d at 1539. The condemned cellhouses remained open at the time of the district court's decision, solely because the court had granted petitioners' request for an extension of the deadline for closing the cellhouses. Petitioners did not contend that they were otherwise in substantial compliance with the injunctions, or

seek to modify the injunctions except with regard to double celling. *Ibid.*

In September 1983 the district court conducted a further evidentiary hearing on the status of petitioners' compliance. After hearing the evidence but before ruling, Judge Luther Bohanon recused himself and this case was reassigned to Judge Frank Seay. Three weeks after being assigned the case, Judge Seay ruled that petitioners were not in compliance with the court's injunctions. *Battle v. Anderson*, No. 72-95-C (E.D. Okla. Dec. 30, 1983) (memorandum opinion and order). The totality of the court's findings concerning compliance read:

> There are four subjects of previous court orders that are still found to be inadequate and not in compliance: racial integration, access to courts, equal protection guarantees for women, and vacating to human habitation the East and West Cellhouses * * * Racial integration of the occupants of double cells is found to be almost nonexistent in the Oklahoma prison system. * * * The court finds that the East and West Cellhouses are still occupied despite their ordered vacation over four years ago. However, the court is satisfied with the assurances from [OSP] director Meachum and Governor Nigh that the cellhouses will be vacated as soon as feasible.

Id. slip op. at 6-7. Despite such findings, the district court discharged the court monitor and dismissed the case, but expressly held that "[a]ll of this court's orders and injunctions as modified heretofore remain in full force and effect." *Id.* slip op. at 10. Again, petitioners did not seek to lift the injunctions.

The district court's decision was reversed and remanded for further proceedings with respect to racial segregation and discrimination. *Battle v. Anderson*, 788 F.2d 1421, 1425 (10th Cir. 1986). In affirming the district court's decision to end its active supervision of the remaining claims, the court of appeals observed that "it is unmistakably clear that the orders and injunctions protecting the inmates against constitutional violations, as previously modified, were in no way intended to be relaxed and that they remain in full force and effect." *Id.* at 1428 n. 5. The court further noted that "plaintiffs may by further proceedings in the district court seek relief from any violations of those previous orders and injunctions protecting their constitutional rights." *Id.* at 1429. Petitioners had urged the court of appeals to affirm the order leaving the injunctions in place:

> [T]his Court may conscientiously affirm the district court's dismissal of supervisory jurisdiction, *particularly* where the district court left in force and effect its prior injunctions as modified.

Brief of Appellees, No. 84-1026, at 104 (10th Cir. filed June 1984) (emphasis supplied).

Petitioners later acknowledged on various occasions the continued viability of the injunctions. In 1989 petitioners unsuccessfully sought a modification of the injunctions to permit renovation of one of the condemned cellhouses, and submitted to the district court in support of that motion:

> The Defendants are well aware that this Court left in full force and effect all of its previous remedial injunctions when it ended day to day supervision of the Department of Corrections.

> These Defendants further recognize their obligation to return to Court if they want to alter the Court's previous injunction closing the East Cell House, hence this Motion. . . . The Defendants have recognized their obligation to seek modification of the Court's order before placing inmates in the East Cell House.

Memorandum Brief of Defendants in Support of Motion to Modify Injunction to Renovate and Permit Inmates to Occupy Closed Cell House, No.72-95-C, at 7, 9 (E.D. Okla. filed May 1, 1989).[6] See *Battle v. Anderson*, 970 F.2d 716 (10th Cir. 1992).

4. The current dispute began in October 1994 when, contrary to the injunctions, petitioners began using day rooms in a maximum security area as open dormitories. Respondents sought specific orders to enforce the injunctions prohibiting that practice. R. 113. Without affording respondents notice or a hearing, the district court denied the motion and, *sua sponte*, terminated the injunctions and its "supervisory jurisdiction," with respect to all areas other than racial segregation. *Battle v. Fields*, No. 72-95-C, slip op. at 14-15 (E.D. Okla. Nov. 17, 1994).

The court of appeals vacated the order and remanded the case for further proceedings. *Battle v. Fields*, No. 94-7175, slip op. 2, 59 F.3d 178 (10th Cir. 1995) (Table).

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[6] In 1989 the district court again dismissed the racial discrimination and segregation claims based solely upon the evidence presented in 1983. *Battle v. Anderson*, No. 72-95-C (E.D. Okla. Dec. 22, 1989). Again, the court of appeals reversed and remanded for further evidentiary proceedings. *Battle v. Anderson*, No. 90-7012 (10th Cir. Oct. 3, 1991). The district court has yet to conduct those proceedings.

Construing the respondents' motion in the district court as one filed pursuant to Federal Rule of Civil Procedure 60(b)(5), the court of appeals held that the district court's summary disposition of the motion was a "[f]ailure to afford due process protections [and, therefore,] constitute[d] an abuse of the district court's discretion." *Id.* slip op. at 2. The court of appeals ordered the district court to hold a hearing to determine the issues raised by the respondents' motion and to determine whether the injunctions should be dissolved. *Ibid.*

5. On remand the district court directed the parties to file briefs "on the issue of whether or not this court should dissolve the prior injunctions in this case as a matter of law." *Battle v. Fields*, No. 72-95-C (E.D. Okla. Sept. 21, 1995) (minute order). Petitioners then moved for the first time since 1979 to dissolve the injunctions. R. 162. Respondents, however, submitted allegations of systemic violations of the injunctions, including uncontested allegations that in early 1995 OSP resumed housing inmates in the condemned cellhouses. R. 165.[7] Respondents also urged that an evidentiary hearing regarding present conditions in OSP was required by the court of appeals' remand. *Ibid.* The United States similarly argued that an evidentiary hearing was necessary to facilitate the "inherently complex and fact-intensive inquiry" into the respondents' allegations, and to determine whether the

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[7] Petitioners have never disputed that they resumed using the condemned cellhouses in early 1995, and at a hearing before the district court on Sept. 26, 1996, petitioners acknowledged that in August 1995 an inmate in the condemned East Cellhouse at McAlester died when he was accidentally electrocuted in his cell as a result of faulty electrical wiring.

injunctions should be dissolved. R. 161 at 4. Respondents also filed applications to show cause why petitioners should not be held in contempt for their use of the condemned cellhouses and triple celling of inmates at the Mabel Bassett Correctional Center. R. 166, 174.

However, the district court entered an order on November 15, 1995, dissolving the injunctions. Pet. App. D1-4. The district court first concluded that "oral argument and an evidentiary hearing are unnecessary." Pet. App. D2. It then readopted the findings it made in its November 17, 1994 order, "dissolve[d] the prior injunctions entered herein, and dismiss[ed] this case, except for the Fourteenth Amendment racial segregation issue originally remanded to this court by the Circuit in 1986." Pet. App. D4.

6. The court of appeals stayed the district court's order dissolving the injunctions pending appeal. *Battle v. Fields*, No. 95-7164 (10th Cir. Dec. 18, 1995) (order granting stay pending appeal). In March 1996 the court of appeals again vacated the district court's order and remanded the case "for a full and fair evidentiary hearing on the plaintiffs' motion to enforce the injunctions and on the defendants' motion . . . to dissolve the injunctions and dismiss the case." Pet. App. B6. The court of appeals rejected petitioners' contention that the injunctions were dissolved in 1983 when the district court dismissed the case except for the issue concerning racial segregation. Pet. App. B4. The court specifically noted that it "[has] previously affirmed the district court's continuing jurisdiction over this litigation and [has] explicitly recognized the continuing viability of the injunctions entered by the

court." Pet. App. B4-5. (citing *Battle*, 788 F.2d 1421, 1428 n. 5 (10th Cir. 1986), and *Battle*, 708 F.2d 1523, 1538-39 n. 4 (10th Cir. 1983), *cert. dismissed*, 465 U.S. 1014 (1984)).

The court of appeals also disagreed with the district court's conclusion that "changed legal standards make an evidentiary hearing futile and unnecessary." Pet. App. B5. The court explained:

> In a case like this the validity of the parties' allegations and the propriety of dissolving the injunctions and dismissing the case cannot be properly determined *without* an evidentiary hearing. * * * To the extent changed legal standards apply, one of the major purposes of a factual presentation is to establish on a point by point basis how such standards do or do not affect the existing injunctions.

Ibid. (citations omitted) (emphasis in original). The court also ordered that the case be reassigned to another judge upon remand. Pet. App. B7.

7. On April 26, 1996, following the court of appeals' decision, Congress enacted the Prison Litigation Reform Act of 1995 (Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996), Pub. L. No. 104-134, 110 Stat. 1321-66 (PLRA).

8. On June 5, 1996, upon remand and reassignment, the district court ordered the parties initially to brief the applicability of the PLRA to this case. R. 2. Petitioners then proceeded to file a motion in the district court seeking to dissolve all existing injunctions, including the injunction against racial segregation, under section 802 (a) of the PLRA (to be codified at 18 U.S.C. § 3626(b)(2)). Defendants' Brief on Applicability of PLRA and Motion

to Dissolve Injunctions and Terminate All Prospective Orders with Brief, *Battle v. Fields*, No. 72-95-B (E.D. Okla. filed July 8, 1996).

9. Petitioners also filed a petition for writ of certiorari on June 27, 1996, seeking review of the court of appeals' March 29, 1996 judgment. The petitioners urged this Court to grant certiorari on two grounds: (1) that the court of appeals erred in not dissolving the injunctions, because the district court has lacked jurisdiction over the injunctions since 1983 when it dismissed the case; and (2) that the newly enacted PLRA mandates dissolution of the injunctions. *Battle v. Fields*, No. 95-2090 (U.S. filed June 27, 1996).

10. On October 7, 1996, this Court granted certiorari, vacated the court of appeals' March 29, 1996 decision and remanded for further consideration in light of the PLRA. Pet. App. C1.

11. On the morning of October 8, 1996, James J. Balsamo, an expert in environmental health and safety, accompanied counsel for respondents and the United States on a previously-scheduled tour of the East Cellhouse at McAlester. Mr. Balsamo concluded that conditions in the East Cellhouse are "deplorable," that the cellhouse is not only filthy, but it also presents "a serious and imminent threat to the life and safety of the inmates." R. 53, Tab C-2. With regard to the electrical system, Mr. Balsamo stated, "This issue alone is so life-threatening that the facility should be closed until the electrical system can be inspected by electrical code officials and upgraded to meet current code requirements." *Ibid.* Mr.

Balsamo documented, among other dangers, live electrical connections with exposed wires and stripped insulation in the steel-walled cells. *Ibid.* In addition, Mr. Balsamo observed a total lack of fire protection in the cellhouse, and the persistent lingering odor of smoke caused by inmates burning paper to heat water. *Ibid.* He also noted sewage water running down cell walls, raw sewage spraying from sewer lines into pipe chases, and unplugged sewer lines. *Ibid.* He noted the absence of hot water in the cells, that rusted sinks are the only source of drinking water for inmates, and those sinks are directly connected to the water for the toilets. *Ibid.*[8]

Petitioners, however, moved to strike further proceedings on the basis of this Court's order. In the afternoon of October 8, the district court granted petitioners' motion to strike evidentiary hearings scheduled for

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[8] Inmates interviewed that day gave sworn statements that the cellhouse is filthy, and infested with spiders, ants, roaches, rats, and cats. R. 53, Tab B. Toilets frequently overflow spilling human excrement and refuse into the cellhouse. *Ibid.* The vast majority of cell windows remained uncovered until shortly before Mr. Balsamo's inspection, when some were covered with plywood. *Ibid.* Each cell is lit with a single bulb which must be turned by hand, and the bulbs frequently shoot sparks or shock inmates. *Ibid.* Cell doors do not function properly and frequently trap inmates in their cells or in the doors. *Ibid.* The showers are filthy and lack cold water. *Ibid.* Many inmates have no clean clothes, and have never been issued clothes, sheets or blankets. *Ibid.* Inmates are not eligible to work and thus have no money to buy soap, toothpaste, or other basic hygiene items. *Ibid.* They must rely upon what are called "care packages" for these essentials. Care packages are in short supply. *Ibid.* On the day of Mr. Balsamo's inspection, there was no soap, and only one razor, available in the cellhouse. *Ibid.*

October 15, 1996, and December 2, 1996, and prohibited further discovery. *Battle v. Fields*, No. 72-95-B (E.D. Okla. Oct. 8, 1996) (minute order).

12. On October 18, 1996, respondents simultaneously applied to the district court for a stay of its order, (R. 52), and moved the court of appeals for an order reaffirming its stay of the district court's 1995 dissolution order and an order of partial remand directing the district court to conduct a hearing on petitioners' use of the condemned cellhouses. Appellants' Emergency Motion to Reaffirm Stay and Reassignment, for Order of Partial Remand or Writ of Mandamus and Request for Expedited Consideration, *Battle v. Fields*, Nos. 95-7164, 96-7013 (10th Cir. filed Oct. 21, 1996). The United States moved for a full remand to the district court. United States' Response to Battle Class's Emergency Motion, *Battle v. Fields*, Nos. 95-7164, 96-7013 (10th Cir. filed Oct. 29, 1996).[9]

13. On November 7, 1996, the court of appeals remanded the case to the district court to "consider the newly enacted" PLRA, (Pet. App. A3), and "for a prompt hearing on the underlying motions." *Ibid*. The court of appeals instructed:

> If [the district court] determines that the PLRA is applicable and constitutional, we direct the

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[9] Respondents supplemented the allegations in their motion on Oct. 22, 1996, reporting an incident on Oct. 21, 1996 in which an inmate in the East Cellhouse at McAlester received a serious electrical shock from a light bulb in one of the cells, rendering him unconscious and in need of medical attention. R. 54.

> district court to the requirement of 18 U.S.C. § 3626(e)(1) that the court 'shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions.'

Ibid.[10]

14. On November 26, 1996, petitioners moved the court of appeals to recall its mandate pending petitioners' filing of a new petition for writ of certiorari. Appellees' Motion to Recall Mandate and Stay Pending Certiorari Petition, *Battle v. Fields*, Nos. 95-7164, 96-7013 (10th Cir. filed Nov. 26, 1996). The court of appeals granted the motion on November 27, 1996. *Battle v. Fields*, Nos. 95-7164, 96-7013 (10th Cir. Nov. 27, 1996) (order recalling mandate and entering stay).

ARGUMENT

1. The remand which petitioners now seek to have reviewed does not present the question whether any of the injunctions should be lifted, but only whether the court of appeals erred in directing the district court to consider the PLRA and conduct evidentiary hearings on

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[10] The district court promptly rescheduled an evidentiary hearing and resumed discovery. Respondents, the United States, Mr. Balsamo, and William B. Wamsley, a fire protection expert, then toured the Oklahoma State Reformatory at Granite. Both Mr. Balsamo and Mr. Wamsley submitted affidavits that current conditions at both McAlester and Granite place inmates in imminent danger of serious or even fatal injury. United States' Motion for Limited Lifting of Stay, Nos. 96-7013, 95-7164, Exhs. 1, 2 (10th Cir. filed Dec. 17, 1996).

the competing motions to enforce and to lift the injunctions. Where the only issue sought to be reviewed concerns the court of appeals' decision to remand an issue to the district court, the issue does not merit consideration by this Court. This Court ordinarily does not review interlocutory decisions such as the remand for additional proceedings at issue here. *See Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari); *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.18, at 195-98 (7th ed. 1993). The lack of finality of the judgment below is thus of itself alone a "sufficient ground for the denial of the [writ]." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

This Court granted certiorari, vacated the decision below and remanded (GVR) for further consideration in light of the PLRA. *Battle v. Fields*, No. 95-2090 (U.S. Oct. 7, 1996). Because the PLRA was enacted after the mandate of the court of appeals, it was not considered by either court below. Petitioners erroneously state that this Court "reversed" the court of appeals' decision, (Pet. 3), suggesting that this Court adjudicated the merits of petitioners' motion to dissolve the injunctions. This Court's GVR, however, did not adjudicate petitioners' motion to dissolve the injunctions.

Only last term, this Court had the opportunity to address the significance and use of a GVR. *Lawrence v. Chater*, 516 U.S. ___, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996). Characterizing the GVR as an "integral part" of the

Court's administration of its discretionary certiorari jurisdiction, this Court specifically noted that the GVR's usefulness in allowing the lower courts to address the impact of new federal statutes upon pending cases. 133 L.Ed.2d at 554. The GVR "assists this Court by procuring the benefit of the lower court's insight before we rule on the merits. . . . " *Ibid.* The GVR is not a determination of the merits of the parties' underlying claims. *Id.* at 554-55.

Upon remand, the court of appeals itself remanded the case to the district court "to consider the newly enacted [PLRA]." Pet. App. A3. The order of remand was an interlocutory decision for additional proceedings, not an adjudication of petitioners' claim that the PLRA entitles petitioners to dissolution of the injunctions. Petitioners' principal contention that the "renewed instructions," (Pet. 9), are erroneous amounts to no more than a restatement of their basic claim that the injunctions should be lifted. However, neither this Court nor the court of appeals ruled on the merits of petitioners' claim. Therefore, the petition does not present the issues argued by petitioners. The court of appeals' interlocutory order of remand does not present any issue other than the propriety of remand. As such, the order does not warrant this Court's review.

It is well-settled that the court of appeals may enter any orders or directions in further progress of a case, not inconsistent with this Court's mandate, as to any question not settled by this Court's decision. *Quern v. Jordan*, 440 U.S. 332 (1979). Such questions may concern whether further proceedings in the district court are necessary. *E.g., Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. ___, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), *upon*

remand, Casey v. Planned Parenthood of Southeastern Penn., 978 F.2d 74, 78 (3d Cir. 1992) (order remanding to the district court for further proceedings). It was well within the court of appeals' discretion to decide whether the issue remanded could be resolved without further proceedings in the district court. *See Watson v. Fort Worth Bk. & Trust*, 487 U.S. 977, 999-1000 (1988). The petition fails to demonstrate that the court of appeals' remand was inconsistent with this Court's mandate or otherwise constituted an abuse of discretion.

2. The order of the court of appeals was, moreover, correct in reaffirming that the district court erred in dissolving the injunctions in 1995. Contrary to the court of appeals' explicit instructions, the district court had dissolved the permanent injunctions without conducting a hearing, and without engaging in the fact-intensive inquiry that this Court's decisions require. *See, e.g., Freeman v. Pitts*, 503 U.S. 467, 491-92 (1992); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384-91 (1992); *Board of Educ. v. Dowell*, 498 U.S. 237, 249 (1991). Institutional injunctions are necessarily temporary in nature. *Missouri v. Jenkins*, 515 U.S. ___, ___, 115 S.Ct. 2038, 2049, 132 L.Ed.2d 63 (1995). Nonetheless, in cases such as this one, in which a court has identified systemic constitutional violations, a court considering dissolution of existing injunctions must carefully review both past conduct and current conditions to determine whether the injunctions remain necessary or practicable to achieve compliance with the Constitution. *Ibid.* The district court's 1995 order did not satisfy that standard.

Petitioners have never seriously suggested that there is a record of their compliance with the injunctions sufficient to support dissolution of the injunctions. In 1982

when the district court considered modification of the injunctions with respect to double celling, there was no dispute that petitioners had yet to alleviate numerous constitutional violations previously identified by the court; petitioners continued to house inmates in the condemned cellhouses, and racial segregation and discrimination persisted. *Battle v. Anderson*, 708 F.2d at 1528. Petitioners neither contended they had substantially complied with the injunctions nor sought to lift the injunctions.

Similarly, petitioners did not challenge the district court's 1983 findings of widespread violations of the injunctions, nor did petitioners seek to lift the injunctions. *Battle v. Anderson*, 72-95-C, slip op. at 6-7. Petitioners, moreover, could not have justified a request to lift the injunctions. The uncontested record established that numerous unconstitutional practices and conditions persisted. Modification of an injunction "must not create or perpetuate a constitutional violation." *Rufo*, 502 U.S. at 391. Petitioners made no claim that statutory or decisional law had changed with respect to any provisions of the injunctions apart from petitioners' agreement to single cell. *See id.*, at 388. Likewise, petitioners did not claim, nor have they ever claimed, that unforeseen factual circumstances supported dissolution of the injunctions. *See id.*, at 384.

Undaunted by their own history of non-compliance, petitioners have persisted in contending that the district court's 1983 dismissal of the case effectively dissolved the injunctions and divested the courts of jurisdiction over these issues. However, the district court's 1983 decision could not be clearer in expressly ruling that "[a]ll of [this court's] orders and injunctions as modified heretofore

remain in full force and effect." *Battle v. Anderson*, 72-95-C, slip op. 10 (E.D. Okla. Dec. 30, 1983); *Battle v. Anderson*, 788 F.2d at 1428 n. 5. Where, as here, a party alleges violations of an existing injunctive order, the district court clearly possesses jurisdiction to consider that allegation. *See, e.g., Board of Educ. v. Dowell*, 498 U.S. at 246, 250; *cf., Hutto v. Finney*, 437 U.S. 678, 690 (1978). Nor does that jurisdiction dissipate because the court has earlier found that the defendant's affirmative unlawful conduct has ceased. *See Board of Educ. v. Dowell*, 498 U.S. at 248 (court's remedial authority extends to, *inter alia*, remedying the effects of past unlawful conduct); *Freeman v. Pitts*, 503 U.S. at 491 (same); *Milliken v. Bradley*, 433 U.S. 267, 280-82 (1977) (same).

The petition gravely distorts the record in contending that the courts declared OSP "constitutional" in 1982. Pet. 11. The courts made no findings in 1982 or 1983 that petitioners had substantially complied with the remedial orders to the extent practicable, or that, *in the absence of the existing injunctions*, there was no reasonable probability that constitutional violations would recur. The district court's December 1983 decision fairly reflects only that the district court accepted petitioners' promises to alleviate unconstitutional conditions as soon as feasible. *Battle v. Anderson*, No. 72-95-C, slip op. 8-9 (E.D. Okla. Dec. 30, 1983). Accepting those promises, the district court ended its active oversight and discharged the court's monitor, leaving the injunctions in place to secure petitioners' promises. *Id.* at 10. The court of appeals relied on that aspect of the district court's holding in affirming the decision, *Battle v. Anderson*, 788 F.2d at 1428 n. 5, and again, petitioners urged the court of appeals to affirm the

district court's decision to end active supervision of the case, on the grounds that the injunctions would remain in full force and effect. The injunctions have thus remained in effect since that time.

Contrary to petitioners' contention, the district court's December 1983 order did not open the injunctions to attack under Rule 65 of the Federal Rules of Civil Procedure. Pet. 18-19. That order dismissed the case, leaving the injunctions in force. The order did not purport to be nor was it tantamount to a separate injunction. Petitioners' contention that "no one can be sure," (Pet. 19), which injunctions are in place as a result of the district court's 1983 order distorts the clarity in this record of specific, uncontested constitutional violations and specific remedial orders designed to correct those violations. Petitioners themselves proposed the substance of the injunctive orders, and have repeatedly acknowledged their understanding of what those orders require. The district court clearly stated its intent that the previous injunctions not be affected by dismissal of the case. The only lingering uncertainty is the extent to which petitioners' have met their 1983 promises to remedy constitutional deficiencies, not whether petitioners knew what the injunctions required them to do.

3. The court of appeals' order vacating the district court's dissolution of the injunctions and remanding the case to the district court for an evidentiary record remains correct under this Court's mandate to consider the PLRA. Nothing in the PLRA retroactively validates the district court's 1995 decision to terminate relief. The court of appeals recognized that "the PLRA purports to establish a new standard by which prison reform decrees

are to be judged," (Pet. App. A3), and determined that a factual inquiry is appropriate to determine how a purportedly new standard, if applied, would or would not affect the existing injunctions.

Petitioners urge that they are entitled to immediate dissolution of the injunctions, without a hearing, under Section 3626(b)(2) of the PLRA. The PLRA purports to authorize dissolution of court orders which were entered without specific findings of constitutional violations, and without finding that the relief ordered is necessary to remedy the identified constitutional violations. Notably, petitioners do not articulate how this new provision alters the standard by which these remedial orders have been judged since at least 1977. *See Milliken v. Bradley*, 433 U.S. at 282 (Federal courts may not order States, over their objection, to undertake a course of conduct not tailored to curing an adjudicated constitutional violation).

Here, the record is replete with findings that remedial relief was necessary to correct specifically identified constitutional violations. The courts instructed petitioners to correct only those conditions which were clearly unconstitutional under established federal case law. Further, since the inception of the litigation, the courts ensured that the injunctions were narrowly drawn and extended no further than necessary to remedy the constitutional violations. The courts have consistently permitted petitioners to propose plans to remedy the constitutional violations in the manner least intrusive to the State of Oklahoma.[11]

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[11] Although petitioners contend that the injunctions obligate them to do more than the Constitution requires in

Finally, petitioners cannot support their contention that the PLRA absolves courts of their responsibility to address evidence that injunctive relief may still be necessary. Under Section 3626(b)(3), injunctive relief does not terminate

> if the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

Here, respondents have made credible allegations that current conditions of confinement violate respondents' rights under the Eighth Amendment as well as the existing injunctions. One inmate has died and hundreds are in physical danger by being housed in the condemned cellhouses. R. 52. Respondents have alleged that the cellhouses are filthy and infested with rodents and insects, and that the cellhouses have dangerous electrical wiring. *Ibid.* The cellhouses leak rusty rainwater and raw sewage,

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requiring petitioners to meet national standards for public health, corrections, and life safety, (Pet. 17-18), petitioners conceded in 1978 that those standards already applied to their operations, *Battle v. Anderson*, 457 F. Supp. at 727, and further, petitioners themselves proposed that those requirements be made part of the injunctions in order to remedy the uncontested findings of constitutional violations. It can hardly be argued that these provisions in the injunctions impermissibly interfere with the State's administration of its prison system.

frequently flood with raw human excrement and refuse, and have windows which are broken, or covered with plywood if covered at all. There is a complete lack of fire protection. Cell doors function improperly, frequently trapping inmates inside or within the doors. Prisoners live in these conditions without clean tap water, without drinking water, without adequate showers, and without adequate supplies of basic items such as soap, towels, and clean clothing necessary to maintain even a minimal level of hygiene and prevent the spread of infection and disease. *Ibid.*[12]

Evidentiary hearings are also necessary before the district court can determine that the PLRA warrants dissolution of the injunctions against racial discrimination and segregation. In the March 1996 order the court of appeals did not address the injunctions against discrimination and segregation, because the district court excluded those injunctions from its dissolution order. Pet. App. D4. A remand is particularly appropriate in light of the allegations of current conditions and the patently deficient record that has existed since 1983.

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[12] It is clear from the record that respondents' allegations are not "new," as contended by petitioners. Pet. 13. Petitioners conceded nearly twenty years ago that the condemned cellhouses are unfit for human habitation. Allegations that those same conditions remain and may now be worse from the passage of time hardly constitute "new" allegations.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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